Jeyasakthy Kumaranayagam v Kandiah Chandrakumaran

HIGH COURT (KUALA LUMPUR) — DIVORCE PETITION NO S4-33-128-1994
VISU SINNADURAI J
27 JUNE 1996

Family Law *— Divorce — Jurisdiction — Domicile — Law Reform (Marriage and Divorce) Act 1976 ss 48 & 49*

Family Law *— Divorce — Mutual consent — Revocation of consent by one party before hearing of petition — Absence of one party at the hearing — Whether hearing of joint petition may proceed — Law Reform (Marriage and Divorce) Act 1976 s 52*

The husband/petitioner ('the husband') is a British citizen, whilst the wife/petitioner ('the wife') is a Sri Lankan citizen. The parties were married in London on 23 February 1985 and had two children. In July 1991, the family moved to Malaysia as the husband took up employment in the University of Malaya. During their stay, differences arose and in March 1994, a joint petition for divorce was presented at the Kuala Lumpur High Court. The husband subsequently fled to England with the two children with no intention of returning. The husband had also withdrawn his consent to the joint petition. The wife wished to proceed with the divorce application. The issues for consideration were (i) whether the court had the jurisdiction to hear the application for divorce, either as a joint petition or a unilateral petition; (ii) if the court had jurisdiction, then what was the effect of the revocation of the consent by the husband in the joint petition; and (iii) whether a joint petition, on the revocation of consent by one of the parties, may be converted into a unilateral petition.

Held, dismissing the application:

(1) Before any divorce proceedings may be heard, the court has to satisfy itself that the domicile of both the parties was in Malaysia at the time the petition was presented (see p 618G–619G); *Tan Guan Hock v Khor Chai Heah* [1990] 1 MLJ 422 ; *Melvin Lee Campbell v Amy anak Edward Sumek* [1988] 2 MLJ 338 and *Rayner v Rayner* [1956] MLJ 179 followed; *Marshall v Marshall* [1956] MLJ 122 distinguished.

(2) As the parties were not domiciled in Malaysia at the time the petition was presented, the court clearly did not have the jurisdiction to entertain this petition (see p 619H–I).

Per curiam:

(1) A joint petition contains two aspects, namely (i) the mutual consent of the parties to dissolve the marriage; and (ii) the ancillary provisions relating to maintenance, custody and

distribution of properties. It is necessary that a joint petition contains both these aspects (see pp 620I–621A).

(2) If in considering any joint petition for divorce, the court is of the view that the consent of one of the parties is not freely given, or that one of the parties had revoked his consent at the time of the hearing of the petiton, the court cannot proceed to hear the joint petition (see p 621C–D).

(3) It is imperative for the petitioners in a joint petition for divorce to be present in court at the hearing of the joint petition, unless their presence had already been dispensed with by the court prior to the hearing date (see p 622C); *Sivanesan v Shymala* [1986] 1 MLJ 400 followed.

(4) Once the basis for the joint petition ceases to exist, that is, the consent of both or either of the parties no longer exists, the petition lapses and as such if the other party wishes to proceed with the divorce, a unilateral petition has to be filed afresh, and all other procedures applicable to such unilateral petition has to be complied with (see p 623H–I).

[Bahasa Malaysia summary

Suami/pempetisyen ('suami tersebut') adalah seorang warganegara Britain, manakala isteri/pempetisyen ('isteri tersebuit') adalah seorang warganegara Sri Lanka. Kedua-dua pihak telah berkahwin di London pada 23 Februari 1985 dan mereka mempunyai dua orang anak. Pada Julai 1991, keluarga tersebut telah berpindah ke Malaysia kerana suami tersebut telah mengambil pekerjaan di Universiti Malaya. Semasa di Malaysia, perselisihan telah timbul dan pada bulan Mac 1994, satu petisyen bersama untuk perceraian telah dikemukakan di Mahkamah Tinggi Kuala Lumpur. Suami tersebut kemudiannya telah melarikan diri ke England dengan membawa bersama kedua-dua anak tanpa niat hendak kembali. Suami tersebut juga telah menarik balik persetujuannya kepada permohonan untuk perceraian. Isteri tersebut ingin meneruskan permohonan untuk bercerai. Isu-isu untuk dipertimbangkan adalah (i) sama ada mahkamah mempunyai bidang kuasa untuk mendengar permohonan untuk perceraian, sama ada sebagai petisyen bersama atau petisyen satu pihak; (ii) jikalau mahkamah mempunyai bidang kuasa, maka apakah kesan penarikan balik persetujuan oleh suami dalam petisyen bersama; dan (iii) sama ada satu petisyen bersama, bila persetujuan ditarik balik oleh sesuatu pihak, boleh ditukarkan kepada satu petisyen satu pihak.

Diputuskan, menolak permohonan:

(1) Sebelum sebarang petisyen untuk bercerai boleh didengar, mahkamah mesti berpuas hati bahawa domisil kedua-dua pihak adalah di Malaysia semasa petisyen itu dikemukakan (lihat ms 618G–619G); *Tan Guan Hock v Khor Chai Heah* [1990] 1 MLJ 422 ; *Melvin Lee Campbell v Amy anak Edward Sumek* [1988] 2

MLJ 338 dan *Rayner v Rayner* [1956] MLJ 179 diikut; *Marshall v Marshall* [1956] MLJ 122 dibeza. A

(2) Oleh kerana pihak-pihak adalah tidak berdomisil di Malaysia pada masa petisyen itu dikemukakan, mahkamah dengan jelas tidak mempunyai bidang kuasa untuk mendengar petisyen ini (lihat ms 619H–I). B

Per curiam:

(1) Sesuatu petisyen bersama mengandungi dua aspek, iaitu (i) persetujuan bersama pihak-pihak untuk membubarkan perkahwinan tersebut; dan (ii) peruntukan sampingan berkenaan dengan nafkah, jagaan dan pembahagian harta. Adalah perlu bahawa sesuatu petisyen bersama mengandungi kedua-dua aspek ini (lihat ms 620I–621A). C

(2) Jika ketika mempertimbangkan apa-apa petisyen bersama untuk perceraian, mahkamah berpendapat bahawa persetujuan salah satu daripada pihak tidak diberikan secara bebas, ataupun bahawa salah satu daripada pihak telah menarik balik persetujuannya pada masa pembicaraan petisyen tersebut, maka mahkamah tidak boleh terus mendengar petisyen bersama itu (lihat ms 621C–D). D

(3) Adalah mustahak supaya pempetisyen-pempetisyen dalam satu petisyen bersama untuk perceraian hadir di mahkamah pada masa pembicaraan petisyen bersama itu, kecuali jikalau kehadiran mereka telah dikecualikan oleh mahkamah sebelum tarikh pembicaraan itu (lihat ms 622C); *Sivanesan v Shymala* [1986] 1 MLJ 400 diikut. E

(4) Sebaik sahaja asas untuk satu petisyen bersama tidak lagi wujud, iaitu, persetujuan kedua-dua atau salah satu daripada pihak-pihak itu tidak lagi wujud, petisyen itu luput dan dengan itu jika pihak yang satu lagi ingin meneruskan dengan perceraian itu, satu petisyen satu pihak mesti difailkan semula, dan kesemua prosedur lain yang terpakai kepada petisyen satu pihak sedemikian mestilah dipatuhi (lihat ms 623H–I).] F G

Notes

For cases on jurisdiction to hear a divorce petition, see 7 *Mallal's Digest* (4th Ed, 1995 Reissue), paras 1939–1945.

For cases on mutual consent, see 7 *Mallal's Digest* (4th Ed, 1995 Reissue), paras 1966–1967. H

Cases referred to

Beales v Beales [1972] 2 All ER 667
Mahon v Mahon [1971] 2 MLJ 266 I
Marshall v Marshall [1956] MLJ 122
Melvin Lee Campbell v Amy anak Edward Sumek [1988] 2 MLJ 338
Rayner v Rayner [1956] MLJ 179
Sivanesan v Shymala [1986] 1 MLJ 400

A *Tan Guan Hock v Khor Chai Heah* [1990] 1 MLJ 422
R Saraswathy v R Palakrisnan [1986] 2 MLJ 127

Legislation referred to

Law Reform (Marriage and Divorce) Act 1976 ss 48, 49, 52, 77(1)(a), 106
B
Divorce and Matrimonial Proceedings Rules 1980
Divorce Ordinance 1952

Dr M Thambirajah (*Thambirajah & Associates*) for the wife/petitioner.
Balwant Singh Sidhu (*Balwant Singh Sidhu & Co*) for the husband/
C petitioner.

Visu Sinnadurai J: This is one of those divorce cases which was acrimoniously contested by the parties. What began as an uncontested joint petition whereby the parties attempted to settle their matrimonial
D differences amicably, soon became fraught with animosity. This case, once again highlights the difficulties which some spouses confront in obtaining a divorce or custody of their children.

As a consequence, the disposal of this petition has been a protracted one. From the time of the filing of the petition to the final disposal, several
E dramatic events took place which necessitated various applications being made by the husband or the wife. The wife initiated proceedings for divorce; subsequently a joint petition was filed; after the joint petition was filed, the husband revoked his consent; at the date fixed for the hearing of the application, the husband was not present in court; whilst the proceedings was still before the court, the husband left the country without the knowledge
F of the wife, taking with him the two children, a pair of twins, aged three; the wife, being left alone in Malaysia, and without any financial means, had to apply for an interim maintenance order; the wife's initial attempts to communicate with her husband and the children in England proved difficult, until the intervention of the court and respective counsel. The
G wife then left Malaysia for England; and finally, whilst these proceedings were still before the court, the husband made certain applications to the English court.

Facts

H The husband, Kandiah Chandrakumaran, is a British citizen, whilst the wife, Jeyasakthy Kumaranayagam, is a Sri Lankan citizen. The parties were married in the Royal Borough of Kingston Upon Thames, London, on 23 February 1985. There are two children of the marriage, a pair of twins, aged three.

In July 1991, the husband took up employment as a surgeon/lecturer
I at University of Malaya. Since that date, the spouses have lived in Malaysia.

During their stay in Malaysia, differences arose between the parties, and as a consequence the wife indicated to the husband that she wished to commence divorce proceedings.

In March 1994, the husband and the wife filed a joint petition at the High Court, Kuala Lumpur for their marriage to be dissolved and for certain ancillary relief. A

In the joint petition, detailed financial provisions were made by the husband for the wife and the children, namely the property in London to be sold and the proceeds of the sale to be used in a specified manner for the benefit of the wife and the children. As regards the care and custody of the children, it was mutually agreed that the wife should be granted custody of both the children and that the husband be granted access to them. B

The hearing C

On 18 March 1994, just before the date fixed for the hearing of the joint petition, a certificate of urgency was filed for the hearing of an ex parte application for an injunction. In this summons-in-chambers (encl 5), filed by the wife, she sought an injunction to restrain the husband from removing the children from her care and custody and, secondly, an injunction to restrain the husband from receiving the gratuity which was payable from University of Malaya to him. The wife also sought an order to restrain the husband from transferring out of the country the proceeds from the sale of a motor vehicle. D

The hearing of this ex parte application was fixed for 24 March 1994. At this hearing, the court pointed out to Dr Thambirajah, who was on record as counsel for both the petitioners in the joint petition, that as the summons-in-chambers for injunction was applied for by the wife alone, on an ex parte basis, a possible conflict of interest could arise if he continued to act for both parties. On the advice of the court, which he readily accepted, Dr Thambirajah agreed that a different counsel ought to be retained by the husband. E F

The court also sought the assistance of counsel as to whether the court had the necessary jurisdiction to hear this ex parte application, as well as the power to hear the joint petition under the Law Reform (Marriage and Divorce) Act 1976 ('the Act'). At the request of counsel, the matter was adjourned so as to enable counsel to study this preliminary issue raised by the court. A new date was then fixed for the hearing of the joint petition. G

On 3 May 1994, Mr Balwant Singh appeared in court and informed the court that he was now acting for the husband and that the husband had now revoked his previous consent to the joint petition. The husband was, however, not present in court, though he was informed of the hearing date. Dr Thambirajah pointed out that without the husband's presence, nor an affidavit indicating that the husband was revoking his consent, there was no evidence before the court as to the revocation of his consent to the joint petition. Mr Balwant then informed the court that he had just filed a notice of withdrawal of consent by the husband. As Dr Thambirajah objected to this notice of withdrawal of consent being filed by Mr Balwant, the matter was once again adjourned to another date to enable the husband to be present in court. H I

A It was only at this stage that the court was informed that the husband had left the country and that he had also taken the two children with him. It was pointed out that the wife who was still in Kuala Lumpur by herself, had no means to support herself in Malaysia. It was argued by Dr Thambirajah that under s 77(1)(a) of the Act, the court had the necessary power to order the husband to pay maintenance to the wife during the B course of any matrimonial proceedings. It was further pointed out that the court had a similar power to order access to the mother of the children pending the outcome of the divorce proceedings.

As it appeared to the court, the application was made, prima facie, during the course of matrimonial proceedings, and as the justice of the C case so demanded that such an order ought to be made both in the interests of the wife and the children, the court granted an interim order for maintenance and also for access by the wife to the children, even though at that stage the children were already in England (see generally the Federal Court decision in *R Saraswathy v R Palakrisnan* [1986] 2 MLJ D 127, where the question as to whether the courts had the power to hear applications for custody or maintenance when there was no pending action for divorce was considered. The court, however, made no other orders until counsel had addressed the court on the legal issues relating to the main petition itself).

On 24 May 1994, the matter, once again came up for hearing. The court E was informed that the husband had left the country for good and had no intention of being present in court as he had revoked his consent to the joint petition. Dr Thambirajah, however, urged the court to hear the joint petition, as the petition as it stood before the court remained a joint petition, and that the revocation of consent by the husband was either irrelevant or even invalid. F After lengthy arguments by counsel for both parties, counsel agreed, on a without prejudice basis, to reach a compromise on the matter.

At the next hearing date, ie 8 June 1994, counsel informed the court that they were unable to reach any settlement. Dr Thambirajah then, once again, urged the court to hear the joint petition. The parties then agreed G to submit written submissions on the relevant questions of law.

Issues

The court narrowed the following issues for consideration by counsel:

(1) Whether the court had jurisdiction to hear the joint application for H divorce, either as a joint petition or a unilateral petition;

(2) If the court had the jurisdiction, what was the effect of the revocation of the consent by the husband on the joint petition;

(3) Whether a joint petition, on the revocation of consent by one of the parties, may be converted into a unilateral or contested petition.

I

Jurisdiction of court

As pointed earlier, the preliminary issue that the court had to consider in this case was whether the court had the jurisdiction to entertain this petition for divorce and the power to grant the divorce.

The general jurisdiction of the High Court to entertain divorce petitions is provided for in s 48(1) of the Act. The said section reads as follows:

> Nothing in this Act shall authorize the court to make any decree of divorce except:
>
> (a) where the marriage has been registered or deemed to be registered under this Act; or
>
> (b) where the marriage between the parties was contracted under a law providing that, or in contemplation of which, marriage is monogamous; and
>
> (c) *where the domicile of the parties to the marriage at the time when the petition is presented is in Malaysia.*
>
> (Emphasis added.)

However, under certain circumstances, the High Court is conferred with additional jurisdiction. This is in cases where the proceedings for divorce are commenced by a wife, and not by a husband. This is provided for in s 49(1) of the Act which provides as follows:

> Notwithstanding anything to the contrary in s 48(1)(c), the court shall have jurisdiction to entertain *proceedings by a wife* under this part, although the husband is not domiciled or resident in Malaysia if:
>
> (a) the wife has been deserted by the husband, or the husband has been deported from Malaysia under any law for the time being in force relating to the deportation of persons, and the husband was before the desertion or deportation domiciled in Malaysia; or
>
> (b) *the wife is resident in Malaysia and has been ordinarily resident in Malaysia for a period of two years immediately preceding the commencement of the proceedings.*
>
> (Emphasis added.)

Domicile

Section 48 of the Act provides that the court has the power to make a decree of divorce only where, inter alia, 'the domicile of the parties to the marriage at the time when the petition is presented is in Malaysia'. Therefore, before any proceedings may be heard by the court, the court has to satisfy itself that the domicile of both the parties was in Malaysia at the time the petition was presented. In the Supreme Court decision of *Tan Guan Hock v Khor Chai Heah* [1990] 1 MLJ 422, Gunn Chit Tuan SCJ (as he then was) observed at p 424:

> ... the petitioner would still have to prove and satisfy the court that both he and the respondent were domiciled in Malaysia at the time when the petition was presented before the court would exercise its powers under s 48 of the Act to grant any relief to the parties.

Similarly Tan Chiaw Thong J in *Melvin Lee Campbell v Amy anak Edward Sumek* [1988] 2 MLJ 338, observed at p 338:

> ... The provision of s 48(1)(c) in my view requires that the court must be satisfied that at the time when the petition in the instant case was presented, the domicile of both the petitioners was in Malaysia.

This requirement of s 48 is equallly applicable to a joint petition under s 52 of the Act. In other words, even if a joint petition is filed by both spouses, the court still has to be satisfied before hearing the matter, that both the parties were domiciled in Malaysia. Sufficient evidence, therefore, has to be adduced to establish the domicile of the parties. As to the burden of proof required to show a change of domicile, see for example, *Marshall v Marshall* [1956] MLJ 122 and *Melvin Lee Campbell v Amy anak Edward Sumek*.

I do not propose to deal with all the cases dealing with the question of domicile for the purposes of obtaining matrimonial relief. The following cases from Malaysia and Singapore, clearly state the law. In the early case of *Rayner v Rayner* [1956] MLJ 179, Taylor J in distinguishing the earlier case of *Marshall v Marshall* [1956] MLJ 122, held that the husband-petitioner whose domicile of origin was English did not acquire a domicile for choice in Singapore, even though he had worked in Singapore and Selangor for a considerable period of time. In distinguishing *Marshall v Marshall*, Taylor J observed at p 80:

> ... [In *Marshall*'s case, the husband-petitioner] had the option of continuing in an employment which involved transfer to another state [of Malaysia], and probably further transfers, or of taking up a new appointment which meant remaining indefinitely in Singapore; he preferred the latter. This was a definite act of choice and in making it the dominant factor was his preference for Singapore as a place in which to reside.

In the more recent case of *Melvin Lee Campbell v Amy anak Edward Sumek*, the High Court in Kuching held that the husband, a foreigner, even though he had married a native of Sarawak and had lived in Malaysia since 1977 (for a period of over ten years before the joint petition for divorce was filed), and had intended to make Malaysia his permanent home, had failed to satisfy the court that at the time of the filing of the joint petition his domicile was in Malaysia. As a consequence, the court held that the court had no jurisdiction to entertain the joint petition.

In the present case, it is clear from the facts that neither the husband nor the wife were domiciled in Malaysia at the time the petition was presented. As stated earlier, the husband is a British subject and the wife a Sri Lankan citizen. They were living in London from 1985 until July 1991 when the parties came to Malaysia. The husband was employed by the university for a fixed term of office. He was a holder of a work permit issued by the Malaysian Government. They owned no properties in Malaysia. The intention of the parties was to live in Malaysia only so long as the husband was employed by the university. There was no intention to change their domicile, certainly not to Malaysia.

I therefore conclude that as the parties were not domiciled in Malaysia at the time the petition was presented, this court clearly does not have the jurisdiction to entertain this petition.

In the light of the view that I have taken, ie that the parties in the present case were not domiciled in Malaysia and that the High Court has no jurisdiction to hear the joint petition, the question of the effect of the revocation of the consent by the husband therefore becomes, strictly speaking, irrelevant for consideration. However, I wish to make certain observations on this issue.

Divorce by mutual consent/joint petition

Dissolution of a marriage by mutual consent was first introduced in most states of Malaysia when the Act was enacted. Contrary to popular belief, it is not based on existing English law, but on the Sarawak Matrimonial Causes Ordinance (Cap 94) which had been in force since 1932 (see *Report of the Royal Commission on Non-Muslim Marriage and Divorce Laws, Preliminary Report of the Joint Select Committee* at p 57). See also generally the Federal Court decision of *Sivanesan v Shymala* [1986] 1 MLJ 400.

Section 52 of the Act provides as follows:

> If husband and wife mutually agree that their marriage should be dissolved they may after the expiration of two years from the date of their marriage present a joint petition accordingly and the court may, if it thinks fit, make a decree of divorce on being satisfied that both parties freely consent, and that proper provision is made for the wife and for the support, care and custody of the children, if any, of the marriage, and may attach such conditions to the decree of divorce as it thinks fit.

By virtue of this section, parties intending to dissolve their marriage by mutual consent need to present a joint petition. Such a joint petition, besides providing particulars of the parties, and details of their said marriage, must also contain the following, namely (a) that both parties freely consent to the dissolution of the marriage; (b) that proper provisions have been made for the wife; and (c) that provisions have been made for the support, care and custody of the children, if any. It is often thought that once these arrangements have been provided for the wife and children, that arrangement must be given effect to by the court. This view is certainly erroneous.

The court on considering a joint petition has wide powers. Having satisfied itself that the consent of both the parties was freely given, the court has to consider whether the arrangements made for the wife and children are proper. This the court does, by considering the income of the parties, the division of matrimonial properties, and the welfare of the children. The court has the power to vary any of the provisions made by the parties, if in the light of the evidence before it, it deems such modifications to be necessary.

A joint petition therefore contains two aspects, namely (i) the mutual consent of the parties to dissolve the marriage; and (ii) the ancillary provisions relating to maintenance, custody and distribution of properties. In approving both these aspects, the court has the discretion whether to approve it in totality, or with modifications. If it approves the first aspect, the court grants a decree of divorce, and if it approves the second, the

provisions made in the joint petition for ancillary relief become the order of the court. The point that needs emphasis is that a joint petition must contain both these aspects. It cannot therefore contain provisions for divorce only and none for ancillary relief, and vice versa. As Lee Hun Hoe CJ (Borneo) in *Sivanesan v Shymala* [1986] 1 MLJ 400, observed at p 401:

> ... In other words, until the terms and conditions are settled and agreed to in the joint petition or amended joint petition the court should never grant a decree of divorce by mutual consent which is completely different from other forms of divorce.

Revocation of consent

The court, before considering the joint petition must be satisfied that the consent of the parties had been freely given to the petition, and that neither party to the joint petition was pressured or coerced into agreeing to the joint petition. This the court may do so, only if both the petitioners are present and by inquiring from both the petitioners in court whether they still maintain their intention to proceed with the joint petition. It is not uncommon that from the time of the filing of the petition, to the hearing of the petition, several intervening events may have taken place such as to necessitate a modification to the terms of the joint petition as agreed to earlier by the spouses. In other cases, as in the present case, one party to the joint petition may have changed his or her mind to the joint petition, and may revoke his or her consent.

If in any case, the court is of the view that the consent of one of the parties is not freely given, or that one of the party has revoked his consent at the time of the hearing of the petition, the court cannot proceed to hear the joint petition. In this regard, the English case of *Beales v Beales* [1972] 2 All ER 667 is instructive. Though as pointed out earlier, there is no similar provision under English law for the presentation of a joint petition. English law does provide that if the parties had been separated for two years, a divorce may be granted if the other party consents to it. Interpreting the words, 'consents to a decree being granted', the court observed at p 674:

> It has been argued that, once a petitioner receives the respondent's consent and proceeds with the petition, there is a binding agreement from which neither can resile, ... But, ... I do not accept the submission as sound in law... . [T]he 1969 Act provides that 'the respondent *consents* to a decree being granted'. This is a deliberate use of the present tense when 'has consented' could have been used. The only possible conclusion is that the consent must continue to decree nisi and consequently must be a valid, subsisting consent when the case is heard. It must remain operative as the expression of the respondent's state of mind up to the moment when the decree is granted.

I too subscribe to the view that consent for purposes of a joint petition under s 52 of our Act is a positive requirement. Even a mere absence of any objection by one of the parties would not suffice (see generally, 13 *Halsbury's Laws of England* (4th Ed) para 645).

Presence of parties at joint petition

It is often thought by parties and sometimes even by counsel acting for them that the agreement reached at by the parties in a joint petition is final and that the subsequent court proceedings is merely a formality. It is therefore not uncommon for counsel acting for both petitioners to inform the court that one of the petitioners is not present in court on the date fixed for the hearing of the petition, and to urge the court to grant the divorce, even in the absence of the other petitioner.

I am of the view that it is imperative for both petitioners to be present in court, unless of course, their presence has been dispensed with by the court on a special application being made to the court prior to the hearing date. My reasons for holding such a view are as follows, firstly, as seen earlier, the court must be satisfied that the consent of the parties had been freely given, and that the said consent of both the parties at the date of the hearing is still effective.

Secondly, a duty is imposed on the courts by the Act to ensure that whatever terms which may have been agreed upon by the parties in the joint petition are fair to each of the parties, and more importantly to the welfare of the children (if any). The court has full powers under the Act to vary any of the terms which in the opinion of the court are not in the best interest of the wife or the children. In such situations, without the presence of the parties, the court may find it difficult to vary any of the agreed terms. It must be borne in mind, that it is undesirable for the court to vary any of the terms without the concurrence of both the parties.

It is not uncommon practice for the same lawyer to act for both the spouses and to draft the joint petition on both their behalves. In some cases, one party may agree to these terms as drafted by the same lawyer without any other independent advice. The need for the parties to fully understand their rights and obligations, especially relating to matrimonial property, financial arrangement and the arrangement for the children are important. It is generally an accepted principle that children should not be separated from one another, and yet in many joint petitions, provisions are made for the 'distribution' of the children between the spouses without any consideration for their welfare. In such cases, it is important that the judge considers in detail these provisions, and be satisfied that in the best interest of the children, particularly their welfare, the agreed arrangement between the parties for the children are acceptable (see generally ss 88 and 89 of the Act).

If the court is not satisfied with the arrangement made for the wife or the children, the court has the full powers to vary these terms. This point was highlighted by the Federal Court in the case of *Sivanesan v Shymala* [1986] 1 MLJ 400 where it was stated at p 404:

> ... There [is] nothing to prevent the learned judge from attaching other terms or conditions to the decree if he deemed fit. But usually before he did so he would explain to the spouses and obtain their consent.

A But if any of the spouses is absent, in his or her absence, it would be difficult for the court to determine what is the best arrangement for the children.

Thirdly, all matrimonial proceedings are in open court. It is a fundamental principle that the parties to any hearing in open court ought to be present B at the hearing proper. A joint petition for divorce is no exception as far as this principle is concerned. Whilst joint petitioners may have the benefit and convenience of saving the parties the embarrassment of stating their matrimonial differences in public, it does not reduce the entire proceedings to the level of a consent order or a mere contractual arrangement. Neither are the courts in matrimonial proceedings reduced to perform mere C mechanical functions. On the contrary, a heavy social responsibility is placed on the judges. This is one of the reasons why a joint petition must be heard in open court only by a High Court judge, and not the registrar or a subordinate court judge.

The need for both the parties to be present at the hearing date was D also emphasized by the Federal Court in the case of *Sivanesan v Shymala.* In this case, Lee Hun Hoe CJ, in delivering the judgment of the Federal Court, discussed the principles of law applicable to divorce on the grounds of mutual consent under the Act. His Lordship said at p 402:

> ... petitioners must appear in court for the court may wish to satisfy itself by E questioning them as to whether they freely consent to the dissolution of their marriage and whether the provision for the wife and for the support, care and custody of the children, if any, are fair and reasonable. It may, after questioning, even attach other conditions if it thinks fit.

Conversion of a joint petition to a unilateral petition

F Dr Thambirajah, on behalf of the wife petitioner has argued that even if the High Court had no jurisdiction to hear the joint petition and that if the consent of the husband to the joint petition had been validly withdrawn, this court still has the jurisdiction to hear the existing petition as presented on the basis that it was a unilateral petition by the wife under s 49 of the G Act. It is said that a party to a divorce should not be prejudiced merely because the other has revoked his or her consent. So long as the first party wishes to pursue with the application for divorce, the mere non-compliance of the procedural aspects of the application ought not to be fatal and the court should proceed to hear the original joint petition as though it was H now a unilateral petition.

I am, however, of the view that once the basis for the joint petition ceases to exist, that is, the consent of both, or either of the parties no longer exists, the petition lapses and as such if the other party wishes to proceed with the divorce, a unilateral petition has to be filed afresh, and all other procedures applicable to such unilateral petition has to be complied I with. Amongst these procedures are service of the petition on the other party, reference to the conciliatory body under s 106 of the Act, and the other rules prescribed by the Divorce and Matrimonial Proceedings Rules 1980.

Though, as a general rule, the non-compliance of certain procedural aspects of a divorce proceedings ought not work to the prejudice of the parties, there are however, certain procedures, especially those relating to service, which ought to be strictly complied with. It is also for this reason that a joint petition cannot be converted into a unilateral petition without any amendments being made to it.

Unilateral petition by wife under s 49 of the Act

In the present case, even on the assumption that the original joint petition, on the revocation of the consent by the husband, can be deemed to be a petition by the wife under s 49, it is still necessary to consider whether certain pre requisites have been fulfilled by the wife before the court can assume jurisdiction.

Section 49 is an exception to the general rule that only parties who are domiciled in Malaysia may file a petition, be it contested or joint, for divorce. However, this exception applies only in cases where the petition is filed by a wife (and not by a husband). A wife may apply for a divorce under s 49 under any one of the following circumstances:

(1) where the wife has been deserted by the husband, subject to the requirement that the husband was domiciled in Malaysia before his desertion: s 49(1)(a); or

(2) where the husband had been deported from Malaysia, again subject to the requirement that the husband was domiciled in Malaysia before his deportation: s 49(1)(a); or

(3) where the wife is resident in Malaysia and that she had been ordinarily resident in Malaysia for two years immediately preceding the commencement of the proceedings.

Generally, situations (1) and (2) would apply to cases where a woman is married to a foreigner husband, and the couple have lived in Malaysia before the husband's desertion or deportation. On the other hand, situation (3) will apply to cases where the woman is married to either a Malaysian or a foreign man, and the couple have lived abroad after the marriage. If the marriage breaks down, and as a consequence, the wife returns to Malaysia, she may then file proceedings for divorce after residing in Malaysia for two years.

It will therefore be seen that s 49 generally applies to cases where the spouses were residing in Malaysia after the marriage and subsequently the husband leaves the wife and goes abroad, or to cases where the spouses have lived abroad, and after the breakup of the marriage, the husband refuses to return to Malaysia to enable the wife to file divorce proceedings. In such cases, the wife will have difficulty in locating the husband, or the husband may refuse to participate in any divorce proceedings. Section 49 applies therefore to overcome these hardships which may be caused to a wife.

Of course, s 49 is wide enough to cover other situations as well. It is therefore argued on behalf of the wife petitioner that, this court has the jurisdiction to hear the wife's petition under s 49(1)(b) as she has been a resident in Malaysia for well over two years. It is further argued by counsel for the wife, that no question of domicile of either of the parties (be it that of the husband or that of the wife) arises for consideration for a divorce filed by a wife under s 49(1)(b).

There appears to be some merit in counsel's argument. Generally, as pointed out earlier, a wife who has been an 'ordinary resident' in Malaysia for two years, may file a petition for divorce under this section. As to the meaning of 'ordinary resident', see the Federal Court decision in *Mahon v Mahon* [1971] 2 MLJ 266, where the Federal Court considered the scope of a similar provision under the then Divorce Ordinance 1952. Though s 49 may be applicable to the present case, there is still the problem of whether a proper petition is before the court. The petition before this court is still in the original form, that is, as a joint petition, though now without the consent of the husband. Even that petition is without any consequential amendments being made to it. At this stage, there is no application made by the wife for any such amendments. What needs to be done first, before this court can consider the wife's petition for divorce under s 49(1)(b), is for a proper petition to be filed. Only then, can the court consider the wife's application for divorce under s 49(1)(b). In the absence of a fresh petition, I therefore feel constrained in exercising this jurisdiction.

Conclusion

In this case, a petition was presented before a Malaysian court to dissolve a marriage registered in England. This feature by itself is not uncommon. What is unusual is the fact that the parties to this divorce proceedings are a British citizen and a Sri Lankan citizen. Though the parties lived in Malaysia, neither is domiciled in Malaysia. These facts raise interesting issues relating to conflict of laws, namely (i) 'does the Malaysian Court have jurisdiction to grant a divorce under such circumstances?'; (ii) 'will such a decree, if granted, be recognized in England?'; (iii) 'and if not, in which country should the wife file the proceedings, in Malaysia, England or Sri Lanka?'

I have merely decided upon one issue, that is that this court has no jurisdiction to grant a divorce based on the petition presented to this court. For reasons spelt out in my judgment, I have dismissed this application. I am fully aware that this decision may appear to be harsh on the wife, but unfortunately for the wife, based on the existing laws, this is the only conclusion I can arrive at.

Application dismissed.

Reported by Lew Chee Seong